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No. 90-619

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

MID-COUNTY FUTURE ALTERNATIVES
COMMITTEE, AN OREGON CORPORATION,
and PETER M. SMITH,

Petitioners,

v.

CITY OF PORTLAND, CITY OF GRESHAM,
PORTLAND METROPOLITAN AREA LOCAL
BOUNDARY COMMISSION, MULTNOMAH
COUNTY, and STATE OF OREGON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OREGON

BRIEF IN OPPOSITION FOR RESPONDENTS
PORTLAND METROPOLITAN AREA
LOCAL BOUNDARY COMMISSION and
STATE OF OREGON

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QUESTION PRESENTED

Respondents Portland Metropolitan Area Local Boundary Commission (Boundary Commission) and the State of Oregon reject petitioners' statement of the question presented. Petitioners' question assumes that the statute at issue was "based on the consent of a majority of landowners in the affected areas," a fact which the state court below found not to be true. Without this fact, petitioners present no federal question for this court to review.



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OPINIONS BELOW

Respondents accept petitioners' statement.

STATEMENT OF JURISDICTION

Respondents accept petitioners' statement.

STATEMENT OF THE CASE

Respondents accept part 1 of petitioners' statement of the case, but reject part 2.

In part 1 of their statement, petitioners correctly describe the events that led to enactment of Or. Rev. Stat. § 199.534. *See* Pet. Cert. at 5-8. Briefly, respondent Boundary Commission had approved annexations of territory to cities under a statutory procedure that permitted the annexations to occur without a formal vote of the people residing in the affected areas. That statute, Or. Rev. Stat. § 199.490(2)(a), permitted respondent Boundary Commission to order the annexation of territory to a city if the city passed a resolution initiating the annexation and a majority of the landowners in the to-be-annexed territory, owning more than half the land which represented more than half of the assessed value of all real property, had given their consent.

The Oregon Court of Appeals invalidated this statutory procedure under Article I, section 20 of the Oregon Constitution.¹ The court reasoned that by permitting landowners to approve an annexation without any say by non-landowners, the procedure unconstitutionally confers a privilege on landowners withheld from non-landowners. *Mid-County Future Alt. v. Port. Metro. Area L.G.B.C.*, 82 Or. App. 193, 728 P.2d 63 (1986) *modified*, 83 Or. App. 552, 733 P.2d 451 (1987). While

¹ Article I, section 20 of the Oregon Constitution provides:

No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

review of the Court of Appeals decision was pending in the Oregon Supreme Court, the legislature enacted a statute which declared the territories annexed. Or. Rev. Stat. § 199.534. The Supreme Court then dismissed the pending case as moot because, in its view, whether the procedure which the Boundary Commission had followed in ordering the territories annexed was constitutional no longer mattered—the territories had been annexed as a result of legislative act, and nothing the Supreme Court might say would affect the status quo. *Mid-County Future Alt. v. Port. Metro. Area L.G.B.C.*, 304 Or. 89, 742 P.2d 47 (1987). Petitioners then filed suit challenging Or. Rev. Stat. § 199.534, the legislative act effecting the annexations.

In part 2 of their statement of the case, petitioners erroneously assert that the federal question was presented and decided in all proceedings below. Petitioners contend they argued below “that a statute which indirectly permits landowners but not others to ‘vote’ on which territories the legislature should annex violates the Fourteenth Amendment.”² Petitioners further contend that the Oregon Court of Appeals “answered the question in the negative,” and that the Oregon Supreme Court necessarily rejected their claim because it “did not directly address the federal issue, other than to comment that the legislature had ‘full range of power over municipalities’ under *Hunter v. City of Pittsburgh*, *supra*. See p. 11a, *infra*.” Pet. Cert. at 10-11.

The Oregon Supreme Court not only did not “directly

² Petitioners tried to argue below that the legislative act of annexation and the triple majority annexation procedural statute suffered from the same constitutional defect—i.e., majority landowner consent. In essence, petitioners argued that the legislature ought not be able to annex territories directly based on the consent of a majority of landowners, when it could not accomplish this result indirectly through the statutory procedure which the Oregon Court of Appeals had declared invalid in the earlier case.

address" the federal question petitioners had raised, the court actually did not decide any federal question at all. The Oregon Supreme Court did not reach the federal question because, as had the Court of Appeals, the court disagreed with petitioners' factual premise that the legislative act of annexation had been based on majority landowner consent. The Supreme Court assumed that the so-called "triple majority" annexation procedure which the Boundary Commission had followed in initially annexing the territories was constitutionally infirm. *Mid-County Future Alt. v. Port. Metro. Area L.G.B.C.*, 310 Or. 152, 164, 795 P.2d 541 (1990). The Oregon court then concluded that the constitutionality of this procedure "does not affect a subsequent legislative annexation. The present enactment does not purport to derive any authority from the prior act—each stands on its own as an expression of legislative will." *Id.*

The Oregon court went on to clarify:

The fact that the present legislation cross-references annexations effected under the former law does not change our view. The cross-reference is only to the property annexed, not to any power exercised. The territories in question have become part of Portland and Gresham, not because an arguably unconstitutional statutory process prevented residents from voting against the annexations, but because the legislature took an independent look at the situation, exercised its own judgment, and annexed the territories. [footnote omitted].

Id. at 164-65.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The question petitioners contend is presented in this case is purely hypothetical given what the lower court found. Petitioners' statement of the question presented is as follows:

Does a state statute which annexes certain unincorporated areas to adjacent cities *based on the consent of a majority of landowners in the affected areas* violate the Equal Protection Clause of the 14th Amendment because it denies residents who do not own land an equal voice in the process?

(Emphasis added.) Leading off the section entitled "Reasons for Granting the Writ," petitioners assert: "The courts below have decided an important question of federal constitutional law in a way that conflicts with applicable decisions of this Court as well as other federal courts." Pet. Cert. at 11-12.

The courts below decided neither the question petitioners posit nor any other important question of federal constitutional law. The Oregon Supreme Court concluded that notwithstanding the assumed unconstitutionality of the procedures leading to the Boundary Commission's annexation of territories to cities, the legislature had plenary authority subsequently to act independently and to annex directly those very same territories, and that it did so in this instance.³ The Oregon Supreme Court thus disagreed with petitioners' premise that the allegedly infirm statute, Or. Rev. Stat. § 199.534, was "based on the consent of a majority of landowners in the affected areas."⁴ Given the state court's determination that the legislative act of annexation was not based on consent of a majority of the landowners in the affected area, the question petitioners attempt to raise here is purely hypothetical.

³ Petitioners do not challenge on federal constitutional grounds the legislature's plenary authority to annex territory to a city, nor could they credibly advance such an argument. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (state, *inter alia*, may expand or contract boundaries of its cities unrestrained by any provision of federal constitution).

⁴ Petitioners do not ask this Court to review the state court's resolution of this essentially factual issue, nor is it appropriate for this court to do so. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987) (Court "... accord[s] 'great weight to the views of the State's highest court' on state-law matters . . . and customarily accept[s] the factual findings of state courts in the absence of exceptional circumstances.").

CONCLUSION

For the reasons set forth above, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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